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OPINION OF WM. D. FENTON

ON THE POWER OF THE LEGISLATURE TO INCREASE THE NUMBER OF JUSTICES CONSTITUTING THE SUPREME COURT OF OREGON.¹

Prepared January 13, 1899, and furnished at that date to Hon. Charles A. Cogswell, Chairman of the Committee on Legislation of the Oregon Bar Association, and Note added by Mr. Fenton December 18, 1909.

Portland, Oregon, January 13, 1899.

Hon. Charles A. Cogswell, Chairman Committee on Legislation, Oregon Bar Association.

My Dear Sir: The following table may show somewhat roughly the existing need of some measure of relief of the Supreme Court:

States.	No. of Justices.	No. Vols. Reports.	Population.
Alabama	5	116	1,513,017
Arkansas	5	63	1,128,179
California, 5 commissioners appointed by Supreme Court.....	7	121	1,208,130
Delaware	5	17	168,493
Florida	5	35	391,422
Georgia	6	101	1,837,385
Idaho	8		84,385
Illinois	8	173	3,826,351

¹The views expressed by Mr. Fenton were sustained by the Supreme Court in an opinion rendered by Mr. Justice McBride on December 21, 1909, in the case of the State of Oregon v. Sam. Cochran. In this opinion Mr. Justice McBride, sitting with his associates, Chief Justice Moore and Mr. Justice Eakin (the other two members of the Court, Mr. Justice King and Mr. Justice Slater not sitting), fully sustained the validity of the legislation increasing the number of Justices from three to five.

Illinois Appellate Court composed of three circuit judges appointed by Supreme Court for three years; seventeen circuits divided into four districts, three judges for each district, besides branch Appellate Court for Chicago, 77 volumes.

Indiana	5	150	2,192,404
Indiana App.	5	16	
Iowa	6	103	1,911,896
Kansas	3	58	1,427,096
Kansas Court of Appeals, two de- partments, each	3	106	
Kentucky	7	99	1,858,635
Maine	8	91	661,088
Louisiana	5	49	1,118,587
Maryland	9	36	1,043,390
Massachusetts	7	170	2,238,943
Michigan	5	111	2,093,889
Minnesota	5	69	1,301,826
Mississippi	3	75	1,239,600
Missouri	7	144	679,184
Missouri App. Court, two divis- ions, each	3	75	
Montana	3	75	132,159
Nebraska, three judges; commis- sioners	3	52	1,058,910
Nevada	3	23	45,761
New Hampshire	7	66	376,530
New Jersey, five vice chancellors, one ordinary, one chancellor....		55*	1,444,933
(Law Court) justices.....	8	66†	
New York	7	156	5,997,353
Appellate Court, four depart- ments; judge each department..	5	121	

North Carolina	3	128	1,617,947
Ohio	6	73	3,772,316
Oregon	3	31	313,767
Pennsylvania	7	186	3,258,014
Rhode Island	7	19	345,506
South Carolina	4	31†	1,151,149
Tennessee	5	100	1,767,518
Chancellors	3	3¶	
Texas	3	91	
Texas Crim. App.	3	37	
Texas Civ. App.; justices each five divisions	3	19	2,235,523
Utah	3	15	207,905
Virginia	5	95	1,658,980
West Virginia	4	43	762,794
Vermont	7	69	332,622
Wisconsin	5	97	1,686,880
Washington	5	21	349,330
Wyoming	3	5	60,705

*N. J. Eq. †N. J. Law. ‡(New Series). ¶Chancery App.

The population given is according to the census of 1890, but it is well understood that the population of Oregon has increased from the figures of that year and may be said now to exceed 500,000. It is also to be considered that the state in area is as large as New England, and that if our expectations are to be realized we shall have in the next decade a population of at least 1,000,000 and consequent increase of business far beyond anything that has occurred in the past or that exists at this time. It is therefore reasonable to suppose that, although appeals may be limited, as they should be, yet the Appellate Court will have all that it can do in the disposition of cases that ought to be heard even though the increase of justices desired shall be made.

The salaries of the justices of the Supreme Court and court commissioners in all of the states so far as I have examined

them, are far in excess, and in most states from one-third to three times the salaries now paid the justices of the Supreme Court of this state. It is admitted that these are reasons that commend themselves to the policy and necessity of the passage of some measure for the relief of the court. And it is conceded that the only real objection is not to the measure itself, nor is it denied that there is necessity almost controlling, but it is claimed that the act is and ought to be declared unconstitutional. It is a primary rule of construction to govern courts and I assume also the legislative branch of the government, that a statute will not be and ought not to be declared unconstitutional unless upon a fair interpretation of the case in the light of the constitution it can be said to be unconstitutional beyond a reasonable doubt. The question, therefore, is not whether or not there is *some doubt* as to the constitutionality of the pending measure, but whether or not a member of the legislative assembly or the Supreme Court, in passing upon such question, can say that beyond a reasonable doubt the statute proposed is or will be unconstitutional. If it is a mere matter of doubt, that doubt must be resolved in favor of the validity of the law or of the measure that is proposed. See

Umatilla Irrigation Co. v. Barnhart, 22 Or. 389;

Crowley v. State, 11 Or. 513;

Cline v. Greenwood, 10 Or. 330;

Cook v. Port of Portland, 30 Or. 583;

Cresap v. Gray, 10 Or. 345;

David v. Portland Water Committee, 14 Or. 33;

Crawford v. Board, 12 Or. 447;

Deane v. Willamette Bridge Co., 22 Or. 167;

Simon v. Northrup, 27 Or. 437.

As said by Mr. Cooley in his work on Constitutional Limitations, 5th Ed., page 216, "It has been said by an eminent jurist that when courts are called upon to pronounce the invalidity of an act of legislation passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every

possible aspect and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void unless the nullity and invalidity of the act are placed in their judgment beyond reasonable doubt." This is the language of Chief Justice Shaw, used in the case of *Wellington*, Petitioner, 16 Pick, 87:

"A reasonable doubt must be resolved in favor of the legislative action and the act be sustained. This is in part because it is presumed that the members of the legislature have first themselves determined that the act was constitutional and have exercised the legislative power in good faith, but it should be controlled by a like rule when construing a constitution and applying the same to pending legislation."

"The courts will never exercise the extraordinary power of declaring an act of the legislature unconstitutional unless there is a plain, palpable and clear conflict between the statute and the constitution." Mr. Chief Justice Bean in *Simon v. Northrup*, 27 Or. 495.

"It is also well settled that contemporaneous and practical construction of a constitutional provision will be given great weight by the courts in construing such provision." *Cooley's Constitutional Limitations*, 31.

"And it is also the rule that the proceedings of the convention which framed the constitution will be examined with a view to ascertain as near as may be the intention of that body." *Cooley's Constitutional Limitations*, 79.

And while these proceedings of such convention are less conclusive of the proper construction of the instrument framed than are legislative proceedings of the proper construction of a statute, in cases of doubt such proceedings afford light as to the intent and meaning of the language used.

Our Supreme Court in *Eddy v. Kincaid*, 28 Or. 556, has recognized the rule that while plain provisions of the constitution cannot be broken down by practical exposition but where for a series of years concurrent legislative exposition of the constitution has existed, the court would not be warranted in

disregarding the same unless satisfied that such practice is repugnant to the plain words of the constitution. Such an exposition is a very persuasive argument and often of controlling force, and it has always been regarded by the courts as equivalent to a positive law. It therefore becomes important to know what view the framers of the constitution held in respect to this provision and those of a kindred or like character, and also as to what has been the result of a practical exposition of the constitution by legislative and executive action.

Section 2, article 7, provides that:

"The Supreme Court shall consist of four justices to be chosen in districts by the electors thereof, who shall be citizens of the United States and who shall have resided in the state at least three years next preceding their election, and after their election to reside in their respective districts. The number of justices and districts may be increased, but shall not exceed five until the white population of the state shall amount to 100,000, and shall never exceed seven. * * *"

Section 3 provides:

"The judges first chosen under this constitution shall allot among themselves their terms of office so that the term of one of them shall expire in two years, one in four years, and two in six years, and thereafter *one or more* shall be chosen every two years to serve for the term of six years."

Section 7 provides that, "Terms of the Supreme Court shall be appointed by law, but there shall be *one term* at the seat of government annually."

Section 10 provides:

"When the white population of the state shall amount to 200,000 the legislative assembly may provide for the election of Supreme and Circuit Judges in distinct classes, one of which classes, *shall consist of three justices of the Supreme Court*, who shall not perform circuit duty, and the other class shall consist of the necessary number of circuit judges who

shall hold full terms without allotment and who shall take the same oaths as the supreme judges."

It is contended, and by those who favor a *strict construction* of the constitution and who regard the same as a *grant of*, and not as a *limitation* upon the powers of the people, that the use of the words in Section 10 before quoted, to wit: "One of which classes shall consist of three justices of the Supreme Court," is *by implication an inhibition against the legislative* increase of the number of justices of which the class so created shall consist. While those who contend that the legislative power exists to increase the number that shall constitute the class believe in the rule *that constitutions, being limitations upon sovereign power and not grants of power*, should be strictly and narrowly construed and ought not be held to deny the *sovereign right reserved to the people unless or by necessary implication* that result *must follow*. You will observe by reference to Section 2, *supra*, that the framers of the constitution created a Supreme Court consisting of four justices and made express provision that such number might be increased, but should not exceed five until the white population of the state amounted to 100,000, and *should never exceed seven*. It seems to me that if it was in the framers' mind to *limit the number* of justices that should compose the class authorized to be created by Section 10, there would have been a limitation in Section 2 expressly providing that the provision, "and shall never exceed seven" should be modified by adding thereto the words, "until the white population of the state shall amount to 200,000," when the supreme justices might be constituted a distinct class, but whose numbers should not exceed three thereafter.

It may be presumed that the provisions of section 2, article 7, were framed by the lawyers who were members of the constitutional convention, and that in a matter where the convention expressly authorized the *first Supreme Court* to consist of *four* justices and not exceed *five* until the population of the state should amount to 100,000, and that thereafter *it should*

never exceed seven, it would have occurred to any lawyer sitting in the convention that the provisions of Section 8 and Section 10 as to number of the justices of the Supreme Court when their duties were changed, ought not to be left in a state of doubt, and that if framers of the constitution *intended to make a limitation* upon the numbers composing the class *other than that contained in Section 2*, they would have written such limitation either in that section or in section 10. The mere fact that the justices, when the white population should amount to 200,000, and when the legislative assembly thereafter might authorize the election of the circuit and supreme justices in distinct classes, were only to perform appellate duties, does not, as it seems to me, imply that the constitutional convention intended to limit the number of justices in such class by the use of the words, "One of which classes shall consist of three justices of the Supreme Court;" and it seems to me clear that if they had intended to so limit the same, they would have used apt and appropriate words, such as, "Shall consist of three justices of the Supreme Court and *no more*, and shall never exceed three," in lieu of the expression in Section 2, "and shall never exceed seven," and in lieu of the words, "shall consist of three justices of the Supreme Court" used in Section 10.

Judge Cooley says in his Constitutional Limitations, page 207, 5th Ed.: "That there is a broad difference between the constitution of the United States and the constitutions of the states as regards the powers which may be exercised under them. The government of the United States is one of *enumerated* powers. The governments of the states are possessed of *all* the general powers of legislation. When a law of congress is assailed as void we look in the national constitution to see if the grant of specified powers is broad enough to embrace it; but when a state law is attacked on the same ground *it is presumably valid in any case*, and this presumption is a conclusive one, unless in the constitution of the United States or of the state we are *able to discover that it is pro-*

hibited. We look in the constitution of the United States for *grants* of legislative power, but in the constitution of the state to ascertain if any limitations have been imposed upon the complete power with which the legislative department of the state was vested in its creation. Congress can pass no laws but such as the constitution authorizes either expressly or by clear implication, while the state legislature has jurisdiction of all subjects on which its legislation is *not prohibited*."

A multitude of authorities sustains these propositions. In *Bushnell v. Beloit*, 10 Wis. 225, the court says:

"We suppose it to be a well settled political principle that the constitution of the state is to be regarded not as a grant of power but rather as a limitation upon the powers of the legislature, and that it is competent for the legislature to exercise all legislative power *not forbidden by the* constitution or delegated to the general government or prohibited by the constitution of the United States."

In *Smith v. Judge*, 17 Cal. 557, the rule is thus stated:

"The legislature has large powers but its authority is not unlimited. But as we said before, those who assert a limitation *must find it* in the constitution." Also, "It is also unquestionable that the mass of powers of government is vested in the representatives of the people, and that these representatives are no further restrained under our system than by *the express* language of the instrument imposing the restraint or by particular provisions which by a clear intendment have that effect. The constitution is not, as in the case of the federal government, a grant of power to the legislature which is its general head and representative."

In this opinion of Mr. Justice Baldwin, Chief Justice Field concurred.

In *Lycoming v. Union*, 15 Pa. St. 166-169, the Supreme Court of Pennsylvania says:

"We must remember that the legislative branch of our government, unlike the federal government, is limited in its remedial jurisdiction only by the express prohibition or impli-

cation equally imperative following from positive provision or deduced from the nature of our political structure."

And in *Commonwealth v. Maxwell*, 27 Pa. St. 453, it is said: "I doubt if any act of the assembly has ever been annulled for contravening an implied rule of the constitution." See also 6 Am. & Eng. Ency. of Law, 2d Ed., p. 934, notes.

It must, therefore, be conceded that the rule by which we are to be guided in construing this section of the constitution is that unless it can be said that these words quoted expressly limit the power of the legislature; or, as some of the authorities hold, unless such limitation appears by necessary implication, the power to increase exists. The opinions of the members of the constitutional convention and what took place in that body in respect to these and similar provisions would seem to be of persuasive force. I have not been able to examine the minutes of the constitutional convention, but I have read and considered the opinions of Matthew P. Deady, S. F. Chadwick, P. P. Prim, R. P. Boise, J. K. Kelly, E. D. Shattuck, and George H. Williams, which were given by them to the judiciary committee of the house in January, 1887, when the legislative assembly had under consideration a bill to increase the salaries of certain state officers, and when the question was mooted under Article 13, Section 1, whether it was within the power of the legislature to increase such salaries in whole or in part. Article 13, Section 1 reads as follows:

"The governor shall receive an annual salary of \$1,500; the secretary of state shall receive an annual salary of \$1,500; the treasurer of the state shall receive an annual salary of \$800; judges of the Supreme Court shall each receive an annual salary of \$2,000; they shall receive no fees or perquisites whatever for the performance of any duties connected with their respective offices; and the compensation of officers *if not fixed by this constitution shall be provided by law.*"

All of these gentlemen were members of the constitutional

convention. Judge Deady was chosen as president and was a colleague of Ex-Governor Chadwick from Douglas County; Judge Prim was a delegate from Jackson County; Judge Kelly from Clackamas County; Judge E. D. Shattuck from Washington County. Besides these men who have achieved distinction in judicial life and in other high offices in the state, there was in the convention Ex-Governor and Ex-Senator Grover, David Logan, John H. Reed, Cyrus Olney, J. R. McBride, all men of ability, lawyers by profession and presumably familiar with the intent and purposes of the constitutional convention. Those who contend for a strict construction of the constitution and who say that the designation of a stated amount for a salary or of a designated number as a class, is a constitutional restriction upon the principle that an *expression of one is an exclusion of the other*, must rely, not upon express words or prohibition, but upon the rule of implied inhibition which some of the courts say is not applicable *to the construction of an instrument which is a limitation upon the power of the people and not a grant of power*. It seems to me that the designation of the stated amounts as salaries under section 1, article 13, can be regarded as impliedly a prohibition upon the legislative assembly to increase or diminish that amount, with more reason than that by section 10, article 7, the constitution has inhibited an increase of the number of justices of the Supreme Court beyond that stated. The concluding part of section 1, article 13, supra, which reads: "The compensation of officers *if not fixed by this constitution* shall be provided by law," implies with some force that the framers of the constitution meant *to fix by the designation of stated amounts such salaries* of such state officers as have been specified, and meant only to permit the legislature subsequently to fix salaries of other officers not so fixed. But I yield my impression to that of the men who participated in framing these provisions and who may be presumed to know what was the intention of the constitutional convention.

Judge Kelly in his opinion declares the rule of construction to be that the constitution of a state is a limitation upon and not a grant of power, and that "We are not to ascertain whether the power to do a certain act of legislation is given to a legislature in a state constitution, but whether it is prohibited, and if not prohibited it can be exercised by the legislative body." Speaking of article 13, section 1, *supra*, he says: "There is here no restriction upon the power of the legislative assembly to increase the salaries of the judges. If the words, 'and no more,' had been added to that clause of the constitution, then clearly there would have been no legislative power to increase the salary over \$2,000, or if the framers of the constitution had employed the restrictive words which they did in regard to the compensation to be paid to members of the legislative assembly, then it would be an unconstitutional act to increase the salary." He calls attention to the fact that under article 4, section 29, the compensation of the members of the legislative assembly is restricted by negative words to "Not exceed \$3.00 per day." Judge Kelly also quotes the minutes of the constitutional convention, pages 92-3, as follows: "Mr. Peebles, a member of that body, moved to amend Section 1 on salaries as follows: 'Provided, further, that the salaries of the judges shall not be subject to increase and the salaries of the governor and secretary of state shall never exceed \$2,000, nor the treasurer exceed \$1,200.'" On this proposed amendment the yeas and nays were called and resulted as follows: Yeas, fifteen; nays, thirty-five. So the proposed amendment was lost. Commenting upon the same he says: "This vote, it seems to me, would indicate that the constitutional convention did not intend to restrict legislative action in regard to increasing the salaries of the officers mentioned in article 13, and that the only limitation on the action of the legislative assembly was that such salaries should *not be less* than the amounts therein provided." In support of this contention he cites *Purcell v. Schmidt*, 21 Ia. 543, 544; *People v. Rogers*, 13 Cal. 159.

Judge Shattuck in his opinion, and more elaborately in his address delivered October 18, 1894, before the Oregon Bar Association (see page 48, "Proceedings of the Oregon Bar Association at the Fourth and Fifth Annual Meetings"), concurs in the view so well expressed by Judge Kelly, citing numerous authorities, and states his conclusions as follows:

"First: That the constitution of Oregon is to be deemed, not a grant of powers, but as a limitation or restriction upon powers already existing.

"Second: That the legislative assembly of Oregon has power to order and enact whatever it may deem proper and useful upon all subjects and other methods, except where its action is restricted by the constitution.

"Third: That the limitation or restriction upon legislative action rendering void an act of the legislative assembly, should be manifested by *express terms and allowed only of cases free from doubt or uncertainty*.

"Fourth: That there is no constitutional impediment to raising the salaries of state officers, directly by legislative action."

In his letter of date January 28, 1887, to the judiciary committee of the house, he says: "Contemporaneous opinion may be resorted to for aid in the construction of the constitution. (See Sedgwick, p. 593, on Construction of Statutory Law.) Looking into the journals of the convention published in 1882, and to be found in the office of secretary of state, pages 87-93 inclusive, some idea may be gathered concerning the opinion of the framers on this point. Efforts were made in the convention to cut off the power of legislation on this subject by an express provisions to be engrafted on the section and they failed. The debates on this subject in the committee of the whole and the discussions at other times and out of doors, all indicated a prevalent opinion that the article as it now stands did not cut off the power of the legislature to raise the salaries."

Ex-Governor Chadwick, in his letter of date January 24, 1887, says:

"It was my understanding that the prevailing opinion of that convention was that the legislature would have the power to increase the salaries of judges. From the action of the convention I was of that opinion myself. Every attempt to prevent the increase of salaries of judges by constitutional provision was promptly voted down. Such attempts were made, as the proceedings will show."

Judge Boise, in his letter of date January 26, 1887, says:

"All authorities on constitutional limitations hold that to deprive the legislative department of the state of the power to legislate concerning any matter touching the interests of the state, words of inhibition must be used." And referring to section 1 of article 13, *supra*, he says: "This cannot be construed to prohibit the assembly which represents the sovereign power of the state from increasing these salaries, if in its judgment it ought to be done. I have frequently heard this matter discussed and always entertained and often expressed the opinion that the assembly has this power."

Judge Prim, in his letter of January 24, 1887, says:

"The legislature clearly has the power to legislate on all rightful subjects of legislation, unless expressly prohibited from so doing, or where prohibition is necessarily implied from some express provision contained in the constitution; or, in other words, the legislature of a state possesses all legislative authority not delegated to the general government or *prohibited by its written constitution.*"

Referring to the section under consideration, he further says:

"The above provision is to the effect that each shall receive that amount without containing a necessary implication that they shall receive no more if the legislature in its wisdom shall so provide." And further:

"It is my understanding that a large majority of the members of the convention was opposed to inserting anything in

the constitution prohibiting the legislature from increasing the salary of the state officers at any time when such increase should become necessary."

He then refers to the action taken by Mr. Peebles and the vote of the convention thereon. He also says that Mr. Packwood also moved to amend said section by striking out all after the word "offices" in the fifth line and insert the words, "Nor shall the pay of any officer in this state be diminished or increased except as provided for in the first section for the making of amendments to this constitution," which was also disagreed to.

Judge Deady, in his letter of January 23, 1887, says:

"I have no doubt of the power of the legislature to increase the salaries of the judges of the Supreme Court. * * * The language of the constitution on its face is fairly susceptible of the construction that the judges shall have the sum therein mentioned *at least* and as much more as the legislature may provide. Certain it is that there is no *express limitation* on the power of the legislature to increase. In such a state of things, even if it can be said that the arguments for and against the constitutionality of the measure are evenly balanced, the doubt ought to be resolved in favor of the increase because it wrongs no one and is demanded by the public good."

He calls attention to the fact that when the article on salaries was on its passage, Mr. Fred. Waymire, from Polk County, moved to amend by adding the words, "and no more," which amendment was rejected by the convention. Concluding his letter he uses this language:

"This is equivalent to a declaration by the convention that framed the constitution that its was not intended thereby to prevent the legislature from increasing the salaries whenever in its judgment the population and business of the country justified and demanded it."

Judge Williams, in his letter of January 24, 1887, says:

"According to my recollection, an effort was made in the

constitutional convention to amend the existing provision as to the salaries of supreme judges by declaring that their salaries should be \$2,000 each per annum, and no more, and the amendment was voted down, leaving the implication that the object of the proposition in the constitution as it now stands was to fix the minimum and not the maximum amount of the salaries."

The opinions of these men are entitled to great weight. They have all been members of the Supreme Court except Ex-Governor Chadwick. Their views and their reasons are peculiarly applicable when we come to construe the words of the constitution contained in Section 10, Article 7. Section 10 has no words of express prohibition nor does it seem to me when read in the light of Section 2, Article 7, that there is any force in the suggestion that the *designation of the number three* is necessarily and certainly an exclusion and denial of power to *increase such number* by direct act of the legislative assembly. Those who take upon themselves the burden of this contention must run counter to the elementary rule by which state constitutions are to be construed. They do not point to words of prohibition, but to the implication that when a *number was designated it excluded by implication any greater or less number*. It may be that it is an implication that no less number should constitute the appellate tribunal, but the implication that a greater number might not be named is essentially at variance with the reasoning of these members of the constitutional convention and with all the authorities. A careful examination of the provisions of the constitution adds force to the contention that the *designation of the number* in section 10, article 7, was as it purports to be, *not a grant of power, not a restriction upon the legislative assembly, but the creation of a tribunal known as the judiciary*, and a co-ordinate branch of the state government, and *some number* had to be specified if there was to be more than one member constituting such court. The policy of the convention in using words of restriction where it was intended that such restric-

tion should exist necessarily implies that if a restriction had been intended here, apt and simple words would have been used therefor. Clear words of limitation are used in the following sections: Sections 3, 4, 5, 6, 8, 9, 12, 13, 16, 18, 19, 20, 21, 24, 25, 26, article 1. In sections 28, 29, 30, 32, 34, 35, article 1, all contain express words of negation or inhibition. The same observations may be made of sections 3, 4, 5, 6, 10, 11 of article 11. Article IV., section 1 provides that "The legislative authority of the state shall be vested in the legislative assembly which shall *consist of a senate and house of representatives*," etc. And article IV., section 2: "The senate shall consist of sixteen and the house of representatives of thirty-four members; which number shall not be increased until the year 1860, provided that the senate shall *never exceed thirty and the house of representatives sixty members*." Here are terms of express prohibition used in connection with the words "shall consist of," or "the senate shall consist of." Words of like import are the words used in section 10, article VII. "One of which classes shall consist of three judges," etc. See also section 7, article IV.; sections 9, 11, 12, 16, 19, 22, 23, 24, 28, 29, 30, article IV.; sections 2 and 3, article V.; sections 8, article VI. Section 2, article VII. expressly limits the number of justices of the Supreme Court so that its number shall *never exceed seven* and that it should not exceed five until the white population of the state should amount to 100,000. *This is the same Supreme Court authorized by the constitution*, although its duties have been made appellate exclusively by law in obedience to the provisions of section 10, article VII. This evident purpose of the framers of the constitutional convention to use prohibitive words where it was the intention to prohibit the exercise of legislative power in a given case, appears in nearly every line and paragraph of the constitution. *In fact, it may be said to be the object of the state constitution not to grant power to the legislative assembly but to limit the power which exists in the people, and such limitation in the nature of things ought to be ex-*

pressly indicated and cover as narrow a field as possible. Any other view is to hold that the people entrusted with sovereign power are not to be trusted in the exercise thereof.. These limitations in the organic law are self imposed and they ought not to be held to exist unless there is some express provision in which the inhibition can be sacredly and jealously guarded. This limitation upon the power of the legislative assembly as representing the people also expressly appears in sections 3 and 4, article IX.; sections 1, 2, 3, 4, 6, 7, 8, 9, 10, article XI.; sections 1, 2, 3, article IV.; sections 3, 6, 7, 8, article XV.

It is also important to note that at the time the constitution was framed the *Supreme Court consisted of four justices*, who performed circuit duty in the four judicial districts then recognized by section 11, article XVIII. The legislative assembly at various times, beginning with the state government, has recognized that the constitution is a limitation and not a grant of power, and unless legislative power is expressly inhibited, it exists. By section 7, article VII. it is expressly provided that the terms of the Supreme Court shall be appointed by law, but there shall be *one term* at the seat of government annually. It is well understood that there has been authorized by law two terms of the Supreme Court annually and in addition thereto, a term has been created to be held at Pendleton. Under the construction of section 7, article VII., as contended for by those who deny the constitutional power to increase the number of justices, there could be but *one term* of the Supreme Court at Salem annually, and the existing law creating a March term and an October term of the Supreme Court would be invalid. A like strict construction of section 3, article IV. as to public institutions of the State would require the State University, Agricultural College, State Normal School, the Pendleton term of the Supreme Court, and all other agencies of the state or institutions which receive its aid or support, to be located at the seat of government, and appropriations therefor would be invalid. Under a strict construction of section 2, article VII.,

that the number of districts shall never exceed seven, we have two (now four) judicial districts in this state that are entirely unauthorized and judges of the Circuit Court who are determining cases involving life and property whose tenure of office depends upon an unconstitutional statute. It is only because of the fundamental rule of construction that the power remains in the people unless taken by express limitation in the constitution that the creation of the eighth and ninth (now also the tenth and eleventh) circuits can be justified under sections 2 and 10, article VII. There are other illustrations of the exercise of legislative power which give force to the views we have suggested. This is not a case where *property rights* or the *personal rights* of any citizen are involved. It is admitted that the form of relief sought is desirable if it can be granted. The objection is founded upon a sentiment. It does not infringe upon any substantial right of any person whatever. The question is political and governmental, and legislative action on this subject is final and not reviewable, excepting possibly by direct attack upon the title to the office, by *quo warranto*. The court is composed of a number of justices. It is a branch of the state government. The constitution distinctly recognizes that it must consist of *more than one*. When the constitution was framed the Supreme Court at the time consisted of four, with provision for its increase, but it should never exceed seven at any time. There might be five when the population of the state reached 100,000. The justices of the Supreme Court might be placed in a separate class and circuit duty cast upon another class when the state had a white population of 200,000. In the judgment of the constitutional convention, it was thought that when the state had such a population and when the legislative assembly saw proper to confer upon circuit judges elected in separate class the sole duty of the trial of cases at nisi prius, and upon the Supreme Court appellate duty only, that then and *at that time three justices* would be sufficient to transact the business. It is not intimated in the section, nor does it anywhere appear

in the constitution that the separate Supreme Court thus authorized and thus to be created at a time far in the future was to be *limited in its membership and always confined to three justices*. If it had been so intended the invariable rule elsewhere observed in the constitution would have been, to have placed inhibitory and negative words clearly expressing this intention.

Yours very respectfully,

(Signed) WM. D. FENTON.

NOTE.

Since this opinion was written the business of the Supreme Court of Oregon has vastly increased, and we now have fifty volumes of reports issued, and Volume 51 is about ready for publication, an increase of twenty volumes since January, 1899. We now have thirteen judicial districts instead of four, when the constitution was framed, and twenty circuit judges instead of four, at that time. These facts indicate the necessity justifying the wisdom of the act of the legislative assembly enacted February 12, 1909 (See Chapter 50, Laws of Oregon 1909, p. 99), but do not justify the enactment of the statute in question if such act be clearly in violation of the constitution of the state. The question has been raised upon a motion of the attorney general of the state and the deputy district attorney of the Fourth Judicial District, filed in the Supreme Court of the state in the case of *State of Oregon v. Sam Cochran*, to direct the clerk of the Supreme Court to issue its mandate in that case affirming a judgment of conviction in the court below in a local option case involving the validity of an ordinance of the town of St. Johns, under which Cochran held a license to sell intoxicating liquors at retail. Mr. Justice McBride, elected as the successor of Mr. Justice Bean, and Mr. Justices Slater and King, appointed by the governor as additional judges provided by Chapter 50, *supra*, concurred in

an opinion reversing the judgment of conviction, holding the ordinance valid, and that the town of St. Johns, under its charter, had authority to pass the same, notwithstanding the local option law under which Cochran was convicted. Mr. Justices Moore and Eakin, who are duly elected justices of the Supreme Court, dissented, holding for affirmance of the judgment. The motion is intended to present the contention that inasmuch as Justices Moore, Eakin and McBride are the duly elected and qualified justices of the Supreme Court, *three in number*, and Justices Slater and King are appointees under Chapter 50 aforesaid, that the opinion of Justices Moore and Eakin express the judgment of the court, instead of being a dissenting opinion, it in fact and in law controls, and the opinion written by Mr. Justice King, concurred in by Mr. Justices McBride and Slater, is the opinion of a minority of the court, thereby intending to present the claim and contention that the act (Chapter 50, *supra*) under which Justices Slater and King were appointed is unconstitutional and void, claiming that under Section 10, Article VII. of the constitution, the number of justices constituting the court cannot be constitutionally *increased beyond three*. Carefully prepared briefs have been submitted by Attorney General A. M. Crawford, District Attorney George J. Cameron, Deputy District Attorney J. H. Page and A. King Wilson, upholding this contention; and an able brief submitted by Judge Thomas O'Day, attorney for Cochran, concurred in by Martin L. Pipes as *amicus curiae*, strongly urges the constitutionality of the act in question. A like brief sustaining the act has been signed and submitted by many prominent attorneys who appear as *amici curiae*. The question has attracted great attention, and is of great interest to the public. It is more important that the constitution should be correctly interpreted than that the motion under consideration should be allowed or denied. Naturally the two justices whose right to sit as members of the court has been questioned find themselves greatly embarrassed, and will doubtless decline to pass upon or consider

the title to the office to which each has been appointed, or to participate in the hearing. This will place upon the other members of the court a grave responsibility, and unless they shall hold that the question cannot be raised in this manner, and can be presented and decided only in a case involving a direct attack, by *quo warranto*, to try the title to the office held by the appointed justices, this grave responsibility must be met. It is hoped that the controversy may be settled, and that the court will pass upon the constitutionality of the act in question, and put at rest, in the public interest, this important question.

A brief review of the proceedings of the constitutional convention which convened on August 17, 1857, and of the debates in the convention, may be of interest. The committee on judicial department created by the constitutional convention which assembled August 17, 1857, which framed and submitted the present constitution, was composed of Messrs. Williams, Olney, Boise, Kelly, Grover, Logan and Prim, each of whom afterwards became a justice of the Supreme Court, excepting Grover, who became governor and United States senator, and Logan, who was a great trial lawyer in Oregon for a generation. These seven lawyers drafted that portion of the constitution creating the judicial department, and, it must be assumed, gave to the sections involved in this discussion careful consideration. As lawyers, they must have appreciated the rules and canons of construction applied to state constitutions—and particularly that cardinal rule that such constitutions are limitations upon and not grants of power—and that all power not limited or restrained by such constitutions remains in the people in their sovereign, legislative capacity. This is fundamental and was well understood by these distinguished men. Why, then, if it was the intention to prevent further legislation increasing the number of justices constituting the Supreme Court, did they not in apt and appropriate words so express that intention? That the number and the increase of the number of the supreme justices was plainly in

the mind of the framers of the constitution, is evidenced by the journal of the constitutional convention. Judge Prim, on August 27, 1857, offered the following resolution:

"Resolved, That a Supreme Court, consisting of one judge, to be elected by the people at large, be incorporated into the judicial system. Provided, the number of judges may be increased when the population shall exceed one hundred thousand inhabitants."

This received the affirmative vote of nineteen members of the convention, but was defeated by a negative vote of thirty-eight. Kelly, Prim and Logan, of the committee on judicial department, voted for the resolution, while Boise, Grover, Olney and Williams voted against it. The president of the convention, Matthew P. Deady, also voted against the resolution. It will be noticed that the Prim resolution suggests no limit upon the number of justices when the population exceeded one hundred thousand. That the article on judicial department was very carefully considered by the committee having the matter primarily in charge, is evident from the meagre record found in the journal of the convention, and that the convention as a body scanned each section of article VII., as it came from the committee and as amended and attempted to be amended, in the committee of the whole, while the report of the committee on judicial department was under consideration, is clearly shown. On August 31, 1857, fourteen days after the convention was organized, the journal quaintly records that "The chairman (of the committee of the whole), Mr. Boise, reported that the committee of the whole having had under consideration the article on judicial department, report the same back with sundry amendments, and recommend its reference back to the committee on judicial department." On September 4, 1857, the journal reads: "The committee on judicial department reported the article on the same as directed by the convention. The article on judicial department was read a second time. On motion of Mr. Kelly, the article on judicial department was ordered to be printed. Mr.

Olney, of the committee on judicial department, submitted a separate proposition, which was read, and on motion of Mr. Olney, ordered to be *printed and attached to the article on judicial department.*" On September 14, 1857, the article on judicial department was taken up, on its second reading, and was read throughout, and Mr. Metzger moved to amend section 20 (now section 21) by striking out the words "term for which I have been elected," and inserting the words "time which I may serve," but the motion was lost. Mr. Kelly moved that the article on judicial department be referred to the committee of the whole, but the motion was withdrawn, and Mr. Chadwick moved to amend section 20 (now section 21) by striking out the words "and for one year thereafter," as they appeared originally in the oath required to be taken by the circuit and supreme judges. As originally framed by the committee, and I think drafted by Judge Boise, the oath read: "I, ———, do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of the State of Oregon, and that I will faithfully and impartially discharge the duties of a judge of the Supreme Court of said state, according to the best of my ability, and that I will not accept any other office except judicial offices during the term for which I have been elected, and for one year thereafter," which motion was agreed to, and these last five words were stricken out. Mr. Metzger thereupon moved to amend section 20 (now section 21) by inserting after the word "supreme" the words "and circuit," which motion was "disagreed to," although logically it should have been agreed to in view of the adoption of the last amendment. Mr. Miller moved to amend section 20 (now section 21), line 3, by striking out all after the word "ability," and Mr. Shattuck demanded the previous question, but the convention voted in the negative, and the question recurred upon the adoption of the proposed amendment. The yeas and nays were demanded, and fifteen voted for the amendment, and twenty-five voted in the negative. Grover and Kelly, of the committee on judi-

cial department, voted in the affirmative, and Boise, Logan and Williams in the negative—Olney and Prim being absent. Mr. Bristow moved to amend section 20 (now section 21) by adding the letter "s" after the word "court" where it occurs, and the amendment was adopted. The form of this oath and the phraseology of the first three lines of section 21 as finally adopted is the basis of the suggestion sometimes made, that the circuit judges of the state are under the constitution, supreme judges, and could be called upon by the three designated by section 10, to perform the duties of supreme justices. The first three lines of that section read: "Every judge of the Supreme Court before entering upon the duties of his office, shall take and subscribe, and transmit to the secretary of state, the following oath:

"I, _____, do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of Oregon, and that I will faithfully and impartially discharge the duties of a judge of the Supreme and Circuit Courts of said state, according to the best of my ability, and that I will not accept any other office, except judicial offices, during the term for which I have been elected.'"

As originally written by Judge Boise and reported by the committee on judicial department, the oath prescribed was intended to apply only to supreme judges, and as has been noticed, the form was changed in open convention by amendment, so as to apply to circuit judges, and the motion of Mr. McCormick to amend the first line by inserting the words "and circuit" after the word "supreme" having been voted down, left the inference that the judge of the Supreme Court "being required to take an oath that he would faithfully and impartially discharge the duties of a judge of the Supreme and Circuit Courts," was in fact a circuit judge—after the Supreme Court, was under the provisions of section 10, subsequently adopted by the convention, to be made distinct and not to perform Circuit Court duty. The argument suggested

that all circuit judges since the separation of the court into distinct classes under section 10, are also supreme judges, is based upon a misconception, as it seems to me, of the several sections of article VII. on this subject, and upon the peculiar language of section 21, as it now stands. But a study of these various sections and of section 20 (now section 21), as it was from time to time amended, and amendments refused by the convention, makes it clear that, since the act of the legislative assembly passed pursuant to section 10, providing "For the election of supreme and circuit judges in distinct classes, one of which classes shall consist of three justices of the Supreme Court who shall not perform circuit duty; and the other class shall consist of the necessary number of circuit judges, who shall hold full terms without allotment, and who shall take the same oath as the supreme judges," circuit judges are no longer entitled to sit as supreme justices. *They never, in fact, did sit as supreme justices, but the supreme justices by virtue of their office, sat as circuit judges.* Originally, by section 2, the Supreme Court as created by the constitution, consisted of four justices chosen in districts by the electors of each separate district, and the number of justices could not be increased beyond five until the white population amounted to 100,000, and *should never exceed seven.* It thus appears that while the supreme justices were performing circuit court duty they were ex-officio circuit judges of the respective districts or circuits, and circuit judges *as such* were not authorized to be elected, and the office was not designated or created as a distinct office until the creation of the two classes under section 10, supra. At that time these circuit judges were required to take the same oath as the supreme justices, and section 20 (now section 21) did not need any of the amendments offered or adopted or rejected making the oath therein provided applicable to circuit judges. But when section 20 (now section 21) was finally adopted, section 10 had not been adopted either by the committee on judicial department or the convention. It had been drafted by Mr. Olney and ordered

"printed and attached to the article on judicial department." (See p. 49, journal.) This is shown by the fact that section 21 as now numbered, is referred to as section 20, and section 14 referred to in the journal, is section 15 as now adopted. (See journal, p. 72.) The record further shows that Mr. Marple moved to amend section 20 (now section 21), line 4, by striking out all after the word "offices" in line 4, to the end of the sentence, and inserting the words, "to which I may have been elected or appointed during my continuance in office;" and to amend the amendment by adding the words, "and one year after," but the amendments were not adopted. Mr. Boise moved to amend section 2, line 2, by inserting after the word "thereof" the words "who shall be citizens of the United States, and who shall have resided in the state at least three years next preceding their election," which, after its adoption, was upon motion of Mr. Kelly, sought to be reconsidered; but upon a call of the yeas and nays the convention refused to reconsider the vote or indefinitely postpone the motion, and the amendment as adopted stood and remains in the constitution. Mr. Chadwick moved to amend section 3, line 2, by inserting after the words "four years" the words "one in six years, and one in eight years, and thereafter, one shall be chosen every two years to serve for the term of eight years," but the amendment was not adopted.

Mr. Packwood moved to amend section 18, line 1, after the word "but" by adding the words "grand juries shall present the"; after the word "delinquency" strike out the word "in" and insert the word "of"; to the word "office" and the letters "rs"; strike out the word "may" where it first occurs in the second line, and insert the words "which shall." This motion was "disagreed to" as the record awkwardly is written. Thereupon, the article having been fully considered, as he supposed, Mr. Lovejoy moved that the article on judicial department be engrossed and read the third time tomorrow, but the motion being withdrawn, "Mr. Kelly moved to insert *between sections 9 and 10 the blank section reported by a mem-*

ber of the committee on judicial department in relation to a Supreme Court separate from Circuit Courts." (See page 74, journal.) The yeas and nays being ordered, the vote upon the adoption of this section (now section 10) resulted in thirty for and nine against its adoption. Boise, Grover, Kelly, Shattuck and Williams voted for the section, and Judge Deady, the president of the convention, against it. Logan, Olney and Prim were absent, as they are not recorded as voting. This section is the identical one submitted by Mr. Olney and, upon the order of the convention, "printed and attached to the article on judicial department." It is fair to assume that it was written by Judge Olney, who was, as is well known, a justice of the Supreme Court, appointed in 1853, re-appointed, and who resigned in 1858, and who sat with Williams as chief justice, and with Matthew P. Deady as associate justice. Judge Olney was succeeded by Reuben P. Boise as associate justice. Judge Olney was very conversant with the organization of the territorial Supreme Court and the judiciary and the public need at that time, and it may be presumed that he anticipated the future and had fully in mind the time when the Supreme Court would be chosen in a distinct class, and when the justices would not perform circuit duty.

Following the adoption of section 10, then unnumbered—Mr. Kelly moved to amend section 14 (now section 15) by adding the following: "But whenever the number of voters in any county shall exceed twelve hundred, the legislative assembly may authorize the election of one person as clerk of the Circuit Court, one person as clerk of the county court, and one person as recorder of conveyances," and this motion was adopted. Mr. Boise moved to amend section 19 by adding the following: "The judges of the Supreme Court shall not, during the term for which they are elected, be eligible to any office within the gift of this state or the United States, except judicial offices;" but the motion was not agreed to. Mr. Farrar moved to amend section 10 (now section 11), line 1, by striking out the word "four" and inserting the word "two"

—the object being to provide that county judges should be elected for two instead of four years. The motion failed. Mr. Olds moved to amend section 3, line 2, by striking out the word “six” and inserting the word “four”—intending to provide that the term of the supreme justices should be four years instead of six, as finally adopted.

After these numerous amendments and motions had been acted upon, and the convention having consumed the entire session from 8 a. m. to noon in its consideration, Mr. Grover moved that the article on judicial department be engrossed and read a third time tomorrow, and it was so ordered. On Tuesday, September 15, 1857, the article on judicial department was read a third time and was adopted by a vote of thirty-eight yeas to ten nays, Messrs. Anderson, Farrar, Kinney, Logan, Marple, Olds, Packwood, Scott, White and Watkins voting against it, and all the lawyers in the convention, including Judge Deady, the president, voting for the article as it now stands in the printed constitution, excepting David Logan, E. D. Shattuck, Cyrus Olney, J. R. McBride and John H. Reed. The lawyers who thus voted were: J. K. Kelly, Reuben P. Boise, P. P. Prim, John Kelsay, Matthew P. Deady, L. F. Grover, Geo. H. Williams, Stephen F. Chadwick. Cyrus Olney, J. R. McBride, E. D. Shattuck, and John H. Reed—the other lawyers in the convention were not present and did not vote upon the adoption of this article as a separate section of the constitution, but approved and signed the constitution as finally framed and passed by the convention. On Wednesday, September 16, the convention considered the amendments from the committee of the whole, in the schedule now article XVIII. of the constitution, and section 11 as it now appears, was added, which provides that: “Until otherwise provided by law the judicial districts of the state shall be constituted as follows: The counties of Jackson, Josephine and Douglas shall constitute the first district; the counties of Umpqua, Coos and Curry, Lane and Benton shall constitute the second district; the counties of Linn, Marion, Polk, Yam-

hill and Washington shall constitute the third district; the counties of Clackamas, Multnomah, Wasco, Columbia, Clatsop, and Tillamook shall constitute the fourth district; and the county of Tillamook shall be attached to the county of Clatsop for judicial purposes." The four justices of the Supreme Court, created by section 2 of article VII., held the Circuit Courts for these four districts, "until otherwise provided by law" pursuant to sections 2, 8 and 10, article VII., and section 11 of article XVIII. By section 8, article VII., it is expressly provided that "The Circuit Court shall be held twice at least in each year, in each county organized for judicial purposes, by *one of the justices of the Supreme Court*, at times to be appointed by law; and at such other times as may be appointed by the judges severally in pursuance of law." *There were no circuit judges, as such, until after the exercise of legislative authority under section 10, supra*, and then and thereupon for the first time, *circuit judges, as such*, were provided for and authorized to be elected as such. The *Supreme Court as a constitutional body* was first created by section 2, article VII., and the members were *primarily* supreme justices, and incidentally performed the duties of holding Circuit Courts. The *Circuit Court* was created at the same time, but *circuit judges, as such*, were unknown to the constitution other than in the person of supreme justices, until after the passage of the act of October 17, 1878 (Session Laws 1878, pp. 81-82) pursuant to section 10, article VII. *The court created in the beginning and composed of four justices, which should never exceed seven in number, as created and defined by section 2, is the same Supreme Court to be elected in a separate class consisting of three justices*, when they were relieved of circuit duty for the first time. The primary object of section 10 was to give authority by constitutional warrant for the election of the justices and circuit judges hitherto, one office and one officer, in separate classes as separate officers and separate offices, and relieving the supreme justices from performing circuit duty, and to permit not less than three nor

more than seven justices of the Supreme Court to be chosen, and to authorize as many circuit judges to be elected in the other class as might be deemed necessary. Section 2, article VII., originally creating the Supreme Court, defining its number to consist of four, but never to exceed seven, remains in full force excepting as modified by section 10, when legislation thereunder was enacted. The *class began with three justices* as a minimum, and shall never exceed seven; the court shall no longer perform circuit court work, and must be elected as a distinct class, and presumably each justice must be chosen by the electors of the entire state, and not by districts.

As proof that the convention deliberately declined to limit the legislative power upon this and kindred subjects, attention is called to its action on September 17, 1857, next to the last day of its session. On that day Mr. Peebles moved to amend section 1, article XIII., on salaries, by adding to the end of the section the following: "Provided further that the salaries of the judges shall not be subject to increase and the salaries of the governor and secretary of state shall never exceed \$2,000, nor the treasurer exceed \$1,200." The yeas and nays were ordered, and there were fifteen yeas and thirty-five nays—Grover being the only lawyer voting in the affirmative, and he was a colleague of Mr. Peebles, from Marion County. Mr. Farrar then moved to amend section 1, article XIII., on salaries, by inserting after the word "diminished" in the seventh line, the words "or increased," and the amendment was adopted by a vote of thirty-six yeas to nine nays. Mr. Williams moved to amend section 1, article XIII., on salaries, by adding at the end of the section as it then stood, the words, "But the compensation of officers, if not *fixed* by this constitution, shall be as prescribed by law," and this was adopted. Thereupon Mr. Packwood moved to amend this section by striking out all after the word "offices" in the fifth line and inserting the words: "Nor shall the pay of any officer in this state be diminished or increased except as provided for in the first section for the making of amendments to this constitu-

tion," and the motion was lost. Mr. Peebles thereupon moved to amend section 1, article XIII., on salaries, by striking out all after the word "offices" in the fifth line, to and including the word "constitution" in the seventh line; and Mr. Bristow moved to amend by striking out all from and including the word "provided," which was accepted by Mr. Peebles, and the amendment thus amended carried by a vote of twenty-two yeas to nineteen nays, leaving section 1, article XIII., as the same now appears in the constitution.

The record shows that the article on judicial department and on salaries received great consideration, and while the proceedings of the constitutional convention cannot be considered as conclusive of the true meaning of the section to be construed, they may be considered as placing the court in a position to interpret the constitution in the light of those who framed its provisions. 2 Lewis's Sutherland Statutory Construction, Sec. 470, 2d Ed. The record is silent upon the adoption of article XIII. as amended, and it is likely that the convention restored the amendment of Judge Williams, as apparently stricken out by the motion of Mr. Peebles, so that as adopted it now reads: "The compensation of officers if not *fixed* by the constitution shall be provided by law." The word "fixed" was evidently used in the sense of "limited," so that the salary could be neither increased or decreased. In cases of salaries not so fixed the legislature could provide what they should be, beyond the minimum specified.

In a spirited discussion between Mr. Logan and Mr. Grover as to the report of the committee on judicial department, under consideration on Wednesday, August 25, 1857, in committee of the whole, it appears that the committee originally agreed that the Supreme Court should consist of four justices, but that it was reported to the committee of the whole that the court should originally consist of three justices created by section 2. The Weekly Oregonian of Saturday, September 19, 1857, in reporting the proceedings of the constitutional convention, says:

"Mr. Deady called the attention of the committee to the amended condition of the bill, suggesting that it would be well to refer it back so as the amendments could be incorporated in their proper places, and suggesting also an amendment to it, 'Provided that until the number of inhabitants shall exceed 100,000, the number of justices *shall not exceed five in number.*' He supposed the population of this country would not exceed that number in twenty years. This proposition may not meet the approbation of the committee, but it may suggest to them that some restraint should be exercised upon the power of making judges by the legislature." The report proceeds further:

"Mr. Kelly favored the idea of *starting out with four justices at the start.* He thought it would be better than referring it to the legislature. It would also give three judges to sit upon the bench, and consequently a majority on division, while it would leave room for the judge who tried the case below to vacate the bench. Mr. Olney feared the country did not expect but three judges, and that the people would be unwilling to support more. He knew the evils arising from a court composed of three judges, and could appreciate it as well as any other gentleman here, but he feared the people would not view it in the same light. The prominent question with them was the expense. Mr. Williams said he would prefer to practice before a separate and independent Supreme Court if he had his choice. He would also prefer to have four justices instead of three, so as to obviate the objection made by the gentleman from Multnomah (Mr. Logan) to the present system. But lawyers and judges, it must be remembered, cannot have their own way. The present system may appear very oppressive and very objectionable to the gentlemen who have practiced in the courts, but it may not so appear to the people. The people do not look at these things as lawyers do. After some further discussion the motion to strike out 'three' and insert 'four' prevailed. Mr. Deady moved the adoption of an amendment *limiting the number of judges to five until the*

inhabitants of Oregon shall exceed 100,000, and provided further that the number of judges shall never exceed seven."

The proceedings as reported do not indicate any further discussion of article VII., creating the judicial department. It must be borne in mind that the debates in the convention were somewhat influenced by the bitterness of partisan controversy. Logan and Dryer, of Multnomah, were the leaders of that minority representing the Whig influence, while Williams, Kelly, Smith, Grover, Deady and Boise were the leaders of the Democratic party. Mr. Dryer was the editor of the Weekly Oregonian, then and now a great newspaper, and at that time published and owned by Thos. J. Dryer, Henry L. Pittock, and E. Treat Gunn. In the issue of the Weekly Oregonian of October 10, 1857, Mr. Dryer editorially says:

"The swaggering, self-conceited, consequential manner in which Lane, Williams, Kelly, Smith, Grover, Lovejoy, Deady, and their pliant followers, assume the adoption of the constitution as a fixed fact is enough, without reference to their past history, to satisfy any mind of their confidence in being able to gull the people with any measure they please. The people, by the adoption of this constitution, would completely tie up their own hands and shackle their right of self-government. They cannot change, amend or alter the constitution for years. The future legislatures are completely stultified and powerless by the provisions of this constitution. Some counties have been crucified, and others rewarded in consequence of their party complexion. * * * *The judiciary system is a complete monarchy, a one-man power, dangerous to the rights and liberties of the people.*"

It may be suggested that in the light of more than fifty years' experience under this constitution the objections urged by Mr. Dryer seem to have been inspired by the times in which he wrote. I have cited these quotations from the report of the proceedings of the constitutional convention, as accurately reported by Mr. Malone for the Oregonian, and from the journal of the constitutional convention as published by authority

of a resolution of the legislative assembly of September 23, 1882, to show that there was no thought in the minds of the framers of the judicial department, or in the mind of any member of the constitutional convention *that the number of justices of the Supreme Court should never exceed three*, after the exercise of legislative authority under section 10. It should be clear to the mind of any candid man, as it seems to me, that instead of there being a restriction upon the legislative power to increase the number of justices beyond the number three, that it is manifest from article VII., taken in its entirety, that the Supreme Court originally should consist of four justices, chosen in districts, who should perform circuit duty; that while they were performing circuit duty the number should not exceed five, and that the number could be increased to five when the white population of the state amounted to 100,000; *but that the number of justices constituting the Supreme Court should never exceed seven at any time or under any circumstances*; that when the white population should amount to 200,000, the legislative assembly could provide for the election of supreme and circuit judges in distinct classes, one of which classes should then consist of three justices of the Supreme Court, who should not perform circuit duty, and the other class should consist of the necessary number of circuit judges. To hold that the number of justices cannot be increased beyond three is to hold that when the legislative assembly exercised its authority under section 10, and provided for the election of the supreme and circuit judges in distinct classes, the provisions of section 2, which gave birth to the Supreme Court and are the only provisions under which it was originally authorized to exist or exists today—have been nullified, and that the inhibition that the number shall never exceed seven no longer has any meaning, effect or purpose.

It is confidently asserted that if consideration be given to the record as shown by the journal, and the debates, as reported at the time, the words used in section 10, article VII.,

designating the number of justices of the Supreme Court, when relieved of circuit duty, were intended to designate a minimum in the class, and in no sense were intended as a limitation upon legislative power.

The constitution was enrolled, and adopted as enrolled, by a vote of thirty-five yeas to ten nays. Mr. Olney, Mr. Meigs, Mr. Shattuck, Mr. Short, Mr. McBride, Mr. Reed, Mr. Prim, Mr. Nichols, Mr. Lewis, Mr. Applegate, Mr. Scott, Mr. Chadwick, Mr. Shrum, Mr. Campbell, of Lane, Mr. Bristow being absent and not voting at the time, afterwards signed the constitution pursuant to a resolution authorizing this to be done by all the members who were absent. The convention was composed of sixty delegates, and was a representative body of men from all the walks of life. The government created by the constitution was simple, economical and ideal, and the constitution as thus framed withstood all efforts to amend the same until the adoption of the initiative and referendum amendment on the 2d day of June, 1902.

Constitutions when adopted should not be quickly changed or set aside, and courts should uphold their provisions. In construing organic law self-imposed upon the people by their votes, courts should never fail to recognize that cardinal rule of construction that state constitutions are limitations upon and not grants of power, and that all power not expressly taken away from the people by the constitution, remains with them to be exercised by the whole people, or by their representatives in legislative assemblies when and as they may decide or desire. Courts will not and should not strive to overthrow an act of the legislative assembly, or an initiative measure adopted by popular vote—by any narrow or strained construction of the constitution. If the constitution plainly forbids the particular exercise of legislative power either by the people or the legislature, the courts will and should uphold the constitution, and deny the law-making power its exercise in the special and particular case. In doing so, the statute must appear to be unconstitutional beyond a reasonable doubt;

that is, a doubt which a reasonable man in the performance of a solemn duty in a matter of grave concern to himself, or to the commonwealth, might have, after a calm, full and dispassionate consideration of the entire matter. It is such a doubt as would cause such a man as a judge, to hesitate to overthrow a statute duly enacted, either by the people by direct legislation, or by their representatives, and would not declare such statute unconstitutional unless compelled so to do by the rules and canons of construction, and by his oath of fidelity and obedience to the constitution. In deciding whether an act of the legislature is unconstitutional, the court cannot so find, unless the conclusion is reached "to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

Commonwealth v. Webster, 5 Cush. 295; approved in
Hopt v. Utah, 120 U. S. 430-440.

If the opinion written more than ten years ago, when no pungent criticism was made, may in some degree assist the court to a just and correct determination, I shall feel that I have performed a duty that I owe to the court, and that I have discharged in part an obligation to the public as well. For this reason I have asked leave to submit this opinion, with this note, for the consideration of the court.

WM. D. FENTON.

Dated December 18, 1909.